FOR ARGUMENT

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No. 90-622

in the Supreme Court of the United States

October Term, 1990

THE STATE OF FLORIDA,

Petitioner,

vs.

LUZ PIEDAD JIMENO
and
ENIO JIMENO,

Respondents.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

RESPONDENTS' BRIEF ON THE MERITS

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QUESTION PRESENTED

DOES THE SCOPE OF A SEARCH OF A MOTOR VEHICLE AUTHORIZED SOLELY BY CONSENT TO SEARCH FOR NARCOTICS EXTEND TO CLOSED CONTAINERS INSIDE THE VEHICLE WHERE THE LAW ENFORCEMENT OFFICER NEVER REQUESTED OR OBTAINED PERMISSION TO SEARCH CONTAINERS INSIDE THE VEHICLE.

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OPINIONS BELOW

The opinion of the Supreme Court of Florida is reported at 564 So.2d 1083 (Fla. 1990). (Pet. App. 1a-3a).

The opinion of the District Court of Appeal of Florida, Third District, is reported at 550 So.2d 1176 (Fla. 3rd D.C.A., 1989). (Pet. App. 4a-6a).

The trial court's order granting motion of Respondents, Luz Piedad Jimeno and Enio Jimeno, to suppress evidence is not reported. (Pet. App. 7a-11a).

STATEMENT OF THE CASE

Respondents, Luz Piedad Jimeno and Enio Jimeno, were the Respondents in the Supreme Court of Florida. The facts of the case, as set forth in the trial court's order granting the Motion To Suppress, are as follows:

> On March 2, 1989, the Court heard the defendants' Motion To Suppress. None of the three defendants were present and counsel agreed to waive their presence.
>
> Based on the testimony of police officer, Frank Trujillo, the Court makes the following findings.
>
> 1. Officer Trujillo first observed the defendant, Enio Jimeno, making a telephone call at a pay phone and consulting his beeper. Because of the conversation he overheard, he became suspicious that Mr. Jimeno was involved in drug trafficking. The officer then followed defendants who went by car to an apartment complex, waited in their car, then drove around, returned to the complex, brought a package into an apartment, took it out and continued driving.
>
> 2. The officer followed the car and stopped Enio Jimeno for making a right turn at a red light without stopping. Luz Jimeno, Enio's wife, was seated in the right front passenger seat and Cesar Tabares was in the back seat.

> 3. The traffic stop was valid and could have been made even if the officer had no suspicion of illegal drug trafficking.
>
> 4. After the stop, Enio Jimeno freely consented to the search of the vehicle he was driving, and advised the officer the car was jointly owned by himself and his wife Luz, who was present when the search was conducted, did not object to the search.
>
> 5. Officer Trujillo found a closed brown paper bag on the floor of the car on the front passenger side. The bag was rolled up and it was not possible to see the contents without unfolding the bag.
>
> 6. Even though Officer Trujillo advised Enio Jimeno that the reason he wanted to search the vehicle was that he was looking for illegal drugs, and the defendant could have assumed that the officer would have searched the bag, the defendant did not specifically consent to the search of the bag and, i[n] (sic) fact, the officer never requested permission to open the bag and examine the contents. (Pet. App. A-5, A-6; A-7).

As explained in Respondents' Brief In Opposition To Petition For A Writ Of Certiorari To The Supreme Court Of Florida, in compliance with Rule 15.1 of the Supreme Court Rules, the trial court also held that the search of Respondents' motor vehicle was not authorized by probabie cause and was solely legally permissible based upon the consent given.

The trial court in reliance on *State v. Wells*, 539 So.2d 464 (Fla. 1989), *aff'd. on other grounds* ___ U.S.___, 110 S.Ct. 1632, 109 L.Ed.2d 1 (1990), held that the scope of the consent given did not extend to the search and seizure of the

bag. The trial court then granted the Motion To Suppress of Luz Piedad Jimeno and Enio Jimeno. (Pet. App. A-1).

The State appealed this decision to the District Court of Appeal of Florida, Third District. That court affirmed the trial court's suppression of the evidence. The court held that a consent to a search of an area for narcotics does not extend the scope of the consent to a sealed container located within the general area consented to. The Third District certified to the Supreme Court of Florida, the question of whether the scope of consent extends to a closed container after consent has been given to search a motor vehicle for narcotics. (Pet. App. A-4).

The Supreme Court of Florida accepted the State's petition for discretionary review based on the certified question. That court approved the decision of the district court and concluded that consent to search the motor vehicle does not extend to a closed container found inside the vehicle. The Supreme Court of Florida relied on its holding in *State v. Wells,* 539 So.2d 464 (Fla. 1989) *aff'd. on other grounds,* ___ U.S.___, 110 S.Ct. 1632, 109 L.Ed.2d 1 (1990). (Pet. App. A-8-A-23).

In *Wells*, the Supreme Court of Florida held that a general consent to open and look into the trunk of an automobile, without informing the occupant of what the police were looking for, was insufficient to authorize the opening of any locked or closed container found in the trunk. The court rejected the State's argument that, pursuant to *United States v. Ross,* 456 U.S. 798, 102 S.Ct. 2157, 72 L.Ed.2d 572 (1982), where there was probable cause to search, the scope of a consent search extends to every part of the vehicle and its contents that may conceal the object of the search.

SUMMARY OF ARGUMENT

Consent to search a motor vehicle does not extend to consent to search a closed paper bag found inside of a vehicle even using the objective standard enunciated in *Terry v. Ohio,* 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968). The consent that Officer Trujillo received to search the motor vehicle did not include consent to search the closed bag.

When law enforcement officers are relying upon consent to conduct a warrantless search their search is limited by the scope of the consent given. *State of Florida v. Wells,* 539 So.2d 464 (Fla. 1989), *aff'd on other grounds,* ___ U.S.___, 110 S.Ct. 1632, 109 L.Ed.2d 1 (1990). Because Officer Trujillo only received consent to search the motor vehicle and not the closed bag, the search of the bag was improper. This is totally reasonable because the consent to search for drugs was not in the abstract. The consent was to search the motor vehicle, not consent to search a closed bag. Asking the correct question would not have placed an oppressive burden on Officer Trujillo. Officer Trujillo, after observing and following Respondents for hours, knew that as a law enforcement officer he was only interested in the paper bag. Therefore, as a law enforcement officer it would have been easier to ask the correct question. Officer Trujillo probably did not ask for consent to search the paper bag because the officer feared that Respondents might have said no.

ARGUMENT

INTRODUCTION

Where there is no probable cause to search, and the state is relying upon consent to justify the search, then the police should have no more authority to search than that reasonably conferred by the terms of the consent.

The Supreme Court of Florida in upholding the trial court's suppression of the cocaine found in respondents' motor vehicle, found that the consent to search the motor vehicle for narcotics did not extend to the closed container found in the vehicle. (Pet. App. A-1)

Certainly law enforcement officers may search a closed bag if given permission to search the closed bag. Such verities as exceptions to the search warrant requirement do not apply when a law enforcement officer is given consent to conduct a warrantless search. In giving consent to search his motor vehicle, Respondents did not give consent to search a paper bag found on the floor of the vehicle. The consent to search applied only to the general open area of the automobile. In fact, the police officers did not obtain consent to search any closed compartments or containers. Assuredly, the same lack of consent for closed containers would have even applied to a closed briefcase in the trunk of a vehicle.

I. THE SCOPE OF A SEARCH OF A MOTOR VEHICLE AUTHORIZED SOLELY BY CONSENT TO SEARCH FOR NARCOTICS DOES NOT EXTEND TO CLOSED CONTAINERS INSIDE THE VEHICLE WHERE THE LAW ENFORCEMENT OFFICER NEVER REQUESTED OR OBTAINED PERMISSION TO SEARCH CONTAINERS INSIDE THE VEHICLE.

After stopping their automobile, Officer Trujillo informed the Respondents that he wished to search the vehicle. What is curious about this, is that Officer Trujillo knew that he really was not interested in searching the vehicle but was interested in searching the closed paper bag which he had earlier seen Respondents' put in the vehicle. Officer Trujillo admitted this on direct examination by the

State at the Motion To Suppress before the trial court when he stated at page 24 of that Motion:

> Q. Now, what happened after you obtained consent to search the vehicle; what happened next?
>
> A. Okay. I knew what I was going to look for. I was looking to see what was in the package we had seen coming down—I immediately went down to the passenger side, opened the door to—the passenger door, and I looked on the floor board. There was a brown grocery bag.

Officer Trujillo clearly knew that he was not interested in searching the vehicle but simply in searching the brown grocery bag. He had been following the Respondents and their vehicle for hours and knew that the object of his interest and his investigation was not the vehicle but the closed container. Notwithstanding Officer Trujillo's target of his interest and investigation, Officer Trujillo asked the Respondents for consent to search the vehicle and not the closed bag.

Officer Trujillo's request to search the vehicle was asked plainly and clearly. If Officer Trujillo was only interested in searching the package he had seen, as he admitted in direct examination, then the officer should have asked for consent to search the closed bag. The proper question should have been, may I search the closed bag and not may I search your vehicle, I am looking for narcotics. In fact, Officer Trujillo's question would have been a shorter and more succint one.

It appears that the law enforcement officer intentionally did not ask for consent to search the paper bag. He could have simply walked up to the Respondents and asked "what's in the paper bag" or asked for permission to search

the bag. Officer Trujillo asked the question which resulted in the answer he wanted.

Let us assume that Respondents knew there was cocaine only in the closed bag. If Respondents knew there was cocaine only in the closed bag and not in the rest of the vehicle then it is logical to assume that Respondents would have easily given their consent to search the vehicle. Concomitantly, it is also logical to assume Respondents would not have given their consent to search the closed bag.

In this cause, the evidence is undisputed that the officer sought permission to only search the vehicle. The failure of Officer Trujillo to obtain specific consent to search the bag is fatal to the State's cause. In *State of Florida v. Wells*, 539 So.2d 464 (Fla. 1989), *aff'd on the grounds*, ___ U.S.___, 110 S.Ct. 1632, 109 L.Ed.2d 1 (1990), the Florida Supreme Court differentiated between the scope of a consensual search and that of a search based upon probable cause.

In *Wells*, 539 So.2nd at 467 the Supreme Court of Florida reasoned that the principles that applied to probable cause searches are totally incongruous to the freedom of choice inherent in consensual searches. The court stated,

> . . . [a] consensual search by its very definition is circumscribed by the extent of the permission given, as determined by the totality of the circumstances. On the other hand, a probable cause search and its scope are compelled, no matter what might be the wish of the individual. A theory based on consent and one based upon state-sponsored coercion thus are incompatible, and fusing them could lead to absurd results. Under such logic, the search of the trunk of a car would be permitted even if the defendant had said 'you can look in my car but not in my trunk.'

The *Wells* court explained this further at 467 when it stated,

> [w]hen the police are relying upon consent to conduct a warrantless search, they have no more authority than that reasonably conferred by the terms of the consent. If that consent does not convey permission to break open a locked or sealed container, it is unreasonable for the police to do so unless the search can be justified on some other basis.

So too, Officer Trujillo had no other basis to search the closed bag. He was given consent merely to search the vehicle but not to search sealed or locked containers within the vehicle.

Petitioner can find no solace in *United States v. Ross*, 456 U.S. 798, 102 S.Ct. 2151, 72 L.Ed.2d 572 (1982) defining the scope of searches conducted based upon probable cause. Officer Trujillo concluded and the trial court agreed that Officer Trujillo had no probable cause to search the closed bag. Officer Trujillo admitted his lack of probable cause during his examination at the Motion To Suppress before the trial court at page 44 when the following colloquy took place:

> The court: . . . Let me ask you something. What good would it have done you to get a search warrant?
>
> The Witness: I didn't think I had enough probable cause to—.

The trial court stated in its Order,

> [s]ince there was no probable cause for the search, no exigent circumstances existed, and the contraband was not in plain view, the search was not legally permissible, . . .

The Court in *United States v. Ross*, 456 U.S. 798, 102 S.Ct. 2157, 72 L.Ed.2d 572 (1982) did not intend to apply its decision to the scope of a search made without probable cause. The *Ross* Court expressly limited itself to cases where there was probable cause to justify the search. *Ross* 456 U.S. at 800, 809, 825. The *Ross* Court stated at 456 U.S. 800,

> [i]n this case, we consider the extent to which police officers—who have legitimately stopped an automobile and who have probable cause to believe that contraband is concealed somewhere within it—may conduct a probing search of compartments and containers within the vehicle whose contents are not in plain view.

The *Ross* Court therefore limits itself to causes where police officers have probable cause to believe that contraband is concealed somewhere within a vehicle. In the case at bar, the trial court held and Officer Trujillo agreed that there was no probable cause for the search of Respondents' vehicle.

The Petitioner's argument can further find no further comfort in *Terry v. Ohio*, 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968). In *Terry* the court found the conduct of a police officer proper where the officer patted down the outer clothing of 3 individuals whom the officer suspected were going to do something illegal based on his more than 30 years of law enforcement experience. The law enforcement officer in *Terry*,

> confined his search strictly to what was minimally necessary to learn whether the men were armed and

> to disarm them once he discovered the weapons. *Id.* 392 U.S. at 30.

Respondents' consent to search only his vehicle is factually distinct from the issues in *Terry*. Notwithstanding the factual dissimilarity of *Terry*, the objective standard enunciated in *Terry* is favorable to the Respondents. A request for consent to search should be as specific as it reasonably and objectively can be. A lack of specificity will result in an inordinate potential for great abuse. Officer Trujillo knew in advance precisely what he was interested in. He deliberately looked in the closed bag when he knew that asking the right question would have probably resulted in his not being given consent.

A consent to search a vehicle should ordinarily be construed to permit law enforcement officers to search the vehicle but not search any closed containers or locked containers within the vehicle. An ordinary and prudent individual would believe that giving consent to the search of her vehicle, without probable cause, would mean that the police would not search inside locked containers, sealed bags, closed suitcases, and any other closed receptacles in which contraband might be found.

In a case such as this one, where the person giving consent is told in advance that the police are looking for drugs, it does not seem logical that an individual such as Respondents would be giving Officer Trujillo permission to search a closed bag if Respondents knew that the closed bag contained narcotics. It seems logical, that Respondents would give consent to search their vehicle and not a closed paper bag because Respondents knew that the drugs were inside the paper bag. Respondents therefore realized that consent to search the vehicle did not include consent to search the closed paper bag.

It was not difficult for Officer Trujillo to ask Respondents to search the vehicle. Certainly, it would not have been any more onerous for Officer Trujillo to ask Respondents for consent to search the closed bag. It is certainly not an unrealistic restriction on a police officer's ability to make a search to have required the officer to get consent to search the paper bag. All it would have entailed was asking the correct question.

In responding to the Brief of Petitioner on its merits we have also responded to the concerns raised by the United States as Amicus Curiae.

In this cause, the trial court, the Third District Court Of Appeals of Florida and the Florida Supreme Court have reviewed this matter based upon the facts in this case and affirmed this cause based on the *Wells* case. The Supreme Court of Florida has held that the consent to search the motor vehicle for narcotics extends only to a visual viewing of the passenger compartment and not to the actual contents located therein.

CONCLUSION

For the foregoing reasons, the decision of the Florida Supreme Court should be affirmed.

Respectfully submitted,

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